

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE MINNESOTA DEPARTMENT OF ECONOMIC SECURITY  
STATE SERVICES FOR THE BLIND

In the Matter of the Appeal of  
Glenn Chamberlin Pertaining  
to the Business Enterprise  
Program of State Services  
for the Blind

FINDINGS OF FACT,  
CONCLUSIONS AND  
RECOMMENDATION

The above-entitled matter came on for hearing before Bruce D. Campbell, Administrative Law Judge from the State Office of Administrative Hearings, on March 13, 1995, in Minneapolis, Minnesota.

Appearances: Donald E. Notvik, Assistant Attorney General, 1200 NCL Tower, 445 Minnesota Street, St. Paul, Minnesota 55101-2130, appeared on behalf of the Department of Economic Security, State Services for the Blind; and James M. Kempainen, Attorney at Law, 8609 Lyndale Avenue South, Bloomington, Minnesota 55420, appeared on behalf of Glenn Chamberlin.

The record of this proceeding closed on April 17, 1995, with the receipt by the Administrative Law Judge of the post-hearing memoranda of counsel.

This Report is a recommendation, not a final decision. The Commissioner of the Department of Economic Security or his designee will make the final decision after a review of the record which may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations contained herein. Pursuant to Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner or his designee. Parties should contact Richard Davis, Assistant Commissioner, State Services for the Blind, Department of Economic Security, Blind and Visually Handicapped Services, 2200 University Avenue West, St. Paul, Minnesota 55114, telephone (612) 642-0508, to ascertain the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUE

The issue to be determined in this proceeding is whether the Department has authority to convert the management of a stand that has been operated under the program as a partnership to the remaining partner upon the withdrawal of that vendor's partner without offering the stand for bids to qualified program participants.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

#### FINDINGS OF FACT

1. Stand Number 96 is operated under state and federal law relating to assistance to the visually handicapped by two visually handicapped vendors who were required by the state to enter into a partnership for the operation of the stand. The stand is located in the Whipple Building at Fort Snelling, Minnesota. The two visually handicapped participants in the partnership operating that stand were, at all times material hereto, Frank Holder, and Pam Hines.

2. Sometime before late September of 1994, Mr. Holder transferred to a stand located in St. Peter, Minnesota, on the basis of his seniority in the assistance program. On September 26, 1994, Ms. Hines requested, by letter to Mr. Charles Hamilton, Director of the Business Enterprise Program of State Services for the Blind, that she be allowed to continue operating Stand Number 96 as a sole proprietor after Mr. Holder transferred to a stand in St. Peter.

3. The revenues obtained at Stand Number 96, which were divided between Mr. Holder and Ms. Hines, have declined recently because of reduced employment and work hours at the Whipple Building and because many persons have stopped smoking. Cigarettes and tobacco-related items were one of the main-stays of the stand's revenues.

4. Ms. Hines requested that she be allowed to assume sole proprietorship of the stand without the "bidding out" Mr. Holder's prior interest to qualified persons on the SSB seniority list.

5. Ms. Hines ranks 32 of 77 in terms of seniority for persons who are qualified to operate a stand under the Business Enterprise Program of State Services for the Blind.

6. Under both state and federal law, the active participation of an Operator Management Committee with State Services for the Blind, Business Enterprise Program, is appropriate. That participation is, however, advisory only. The Department, under state and federal law, maintains final responsibility for the administration of the Business Enterprise Program.

7. Persons qualified to operate an enterprise under the Business Enterprise Program of the State Services for the Blind elect representatives on a geographic basis to the Operator Management Committee, which meets periodically to discuss and vote on issues related to the Business Enterprise Program of State Services for the Blind.

8. The request of Ms. Hines was taken up at a meeting of the Operator Management Committee on October 14, 1994, at Fergus Falls, Minnesota. Notice of the meeting was given to all licensed operators on September 14, 1994. The agenda which was sent out with the notice stated as an item of business the request of Ms. Hines that she be allowed to assume the interest of Mr. Holder in operating Stand Number 96 and, in effect, changing the operation of Stand Number 96 from a forced partnership to a sole proprietorship.

9. During the meeting of the Operator Management Committee on October 14, 1994, the Committee discussed Ms. Hines' request. Comment was provided about the history of "partnerships" in the Business Enterprise Program of State Services for the Blind. Ms. Hines also stated that between October 1993 and September 1994, the revenues at Stand Number 96 were approximately 25% below the program average. During the course of the meeting, a discussion regarding "bidding out" also took place. This concept is that when there is a partnership and one partner chooses to withdraw, at least once, with the initial withdrawal of a partner, the vacant partnership position must be offered to the participants in the program on the basis of their seniority. If a qualified individual "bids in", that individual would then become a partner with the remaining, initial partner, until one of them ceased to operate the stand. Apparently, at that point, the partnership would be dissolved and there would not be a second "bidding out" process. The stand would then be operated as a sole proprietorship.

10. There is no specific basis in either state or federal law, including implementing rules, for the concept of partnerships. At one point, it was apparently the operating philosophy of the Department that the number of available positions, and resulting income, should be spread out as much as possible among qualified vendors by maximizing the amount of employment. They, therefore, forced partnerships at the most lucrative stands. The current philosophy of the Department appears to be that partnerships are no longer necessary, given declining revenues, and that the amount of money received from operating a stand should approximate a system average without dilution through forced partnerships.

11. There have been only a few forced partnerships in stand operation, historically, with the State Services for the Blind Business Enterprise Program. Two have already been terminated as discussed in the following Findings.

12. On March 18, 1993, the Operator Management Committee, with the approval of State Services for the Blind, allowed the remaining partner to become the sole operator of Stand Number 62 at the Minnesota Transportation Department Building after one person left the stand operation without the "bidding out" of the interest of the partner leaving. Ex. 8A.

13. On April 14, 1989, the Operator Management Committee decided that "bidding out" should be used in reducing a stand from two to one operators by offering the stand for bids as a partnership with the understanding that the stand would ultimately become a sole proprietorship operation if one partner later left after the "bidding out" or if no licensed operator bid on the stand. Ex. 7A.

14. State Services for the Blind, in its ultimate management of the Business Enterprise Program, approved of the March 18, 1993 and April 14, 1989 decisions of the then-current Operator Management Committee.

15. The Department currently takes the policy position that it is inappropriate to apply the bidding process to the few remaining partnerships as part of a transition of a stand from a partnership to a sole proprietorship.

16. At the OMC meeting of October 14, 1994, after the discussion about the need to "bid out" the interest of Mr. Holder, the OMC voted 6-1 to allow Ms. Hines to assume the management of Stand Number 96 as a sole proprietor after her partner, Mr. Holder, transferred locations.

17. The Department has endorsed the decision of the Operator Management Committee with respect to the elimination of the partnership at the Fort Snelling Whipple Building stand without "bidding out".

18. At the hearing herein, Mr. Glenn Chamberlin raised largely philosophical questions about the policies of "bidding out" as regards partnerships. It is his belief that the number of persons actively employed managing stands should be maximized. Part of this maximization would require the use of partnerships and their continuation, at least through the first withdrawal of a partner.

19. Mr. Chamberlin has no financial or actual interest in becoming a partner at the Whipple Building stand at Fort Snelling. His disagreement is apparently philosophical rather than monetary.

20. Mr. Chamberlin filed a timely request for hearing under state and federal law.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

### CONCLUSIONS

1. The Department of Economic Security State Services for the Blind has jurisdiction over the subject matter of the hearing.

2. Proper notice of the hearing was timely given, and all relevant substantive and procedural requirements of law or rule have been fulfilled and, therefore, the matter is properly before the Administrative Law Judge.

3. No provision of federal or state law, including implementing rules, requires a "bidding out" process when a stand operated under the Business Enterprise Program of State Services for the Blind becomes a sole proprietorship, rather than a partnership.

4. There is no historical policy the Department has uniformly applied in cases involving the conversion of a stand's management from a partnership to a sole proprietorship as regards "bidding out".

5. Any Finding of Fact more properly termed a Conclusion, and any Conclusion more properly termed a Finding of Fact is hereby expressly adopted as such.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

### RECOMMENDATION

IT IS THE RECOMMENDATION of the Administrative Law Judge to the Commissioner or his designee that she or he authorize Stand Number 96, located at the

Whipple Building in Fort Snelling, St. Paul, Minnesota, to be operated by Ms. Hines as a sole proprietorship without first offering the former interest of Mr. Frank Holder to persons participating in the program on the basis of their seniority.

Dated this 16th day of May, 1995.

s/ Bruce D. Campbell

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BRUCE D. CAMPBELL

Administrative Law Judge

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### NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the Agency is required to serve its final decision upon each party and the Administrative Law Judge by first-class mail.

### MEMORANDUM

Sometime in the past, the Department and the Operator Management Committee decided to depart from existing law by embellishing upon it without the adoption of rules. First, under some unidentified "policy", the unprovided-for creature of a forced partnership was created. At some later time, perhaps under a different Operator Management Committee and with different personnel at the Department, the policy favoring partnerships changed. From the decision made in 1989, it is apparent that, initially, the "bidding out" process was favored by the then-current OMC and the Department. In 1993, however, the then-current OMC and the Department decided that a "bidding out" system was not only unwise, but perhaps illegal, since, technically, a stand where one partner leaves is not a new or vacated stand. To complicate this excursion into policy decision without rulemaking, someone apparently decided that if there were to be a "bidding out", it would only happen once, not twice or multiple times. Moreover, there are no procedures in state or federal law or implementing rules for the creation of a partnership. It is not known, for example, what income threshold must be generated by a stand before a partnership would, initially, be forced.

The foregoing discussion ought to be a clear direction to the Department that if it wishes to set policy which interprets law, and which has the force and effect of law, it must adopt rules under the Minnesota Administrative Procedures Act, Minn. Stat. c. 14 (1994). Sa-Ag, Inc. v. Minnesota Department of Transportation, 447 N.W.2d 1, 5 (Minn. App. 1989); Swenson v. State Department of Public Welfare, 329 N.W.2d 320, 324 (Minn. 1983); McKee v. Likins, 261 N.W.2d 566 (Minn. 1977).

The Administrative Law Judge need not, however, decide whether the subject of "bidding out" constitutes an unpromulgated rule. The only basis that Mr. Chamberlin

raised regarding his right to a determination in his favor is that the Department had a uniform, longstanding policy to require a "bidding out" process. As noted in the Findings, however, this is not the case. In 1989, the OMC and the Department took one position and in March of 1993, the OMC and the Department took a contrary position. Neither position is dictated by law. As previously noted, the subject of partnerships itself, apart from "bidding out", is not even referenced in governing law. The Administrative Law Judge must, therefore, reject Mr. Chamberlin's position that a general policy of the Department entitles him to have the action of the OMC and the Department vacated and the stand bid out one last time, before its management changes to a sole proprietorship.

Mr. Chamberlin does argue, in his brief, that some type of public meeting and input would be necessary before there was a change of position by the Department affecting the policies under which the program is operated. Mr. Chamberlin specifically references Minn. Stat. § 248.07, subd. 11 (1994). Subdivision 11 provides:

Any major changes in policies made by the Commissioner in the conduct of this program will be preceded by a public hearing. Each operator shall be given thirty (30) days' notice of such hearing.

The Administrative Law Judge does not believe that there had been a policy adopted by the Commissioner with respect to bidding out partnerships, even if the Commissioner could adopt such a policy without violating the Minnesota Administrative Procedures Act. What appears to have occurred is that different decisions were made at different times without any announced policy by the Commissioner or the Department. Therefore, Minn. Stat. § 248.07, subd. 11 (1994), does not negate the action of the OMC and the Department in this case.

Even if, for the sake of argument, Minn. Stat. § 248.07, subd. 11 (1994), were read as requiring some type of public meeting after 30 days' notice of the hearing to all operators of stands, the Administrative Law Judge believes that the meeting of the OMC held on October 14, 1994, in Fergus Falls, which was preceded by 30 days notice to all operators of stands and staff of the program, satisfied any even arguable requirement of Minn. Stat. § 248.07, subd. 11 (1994).

Although not raised at the hearing, the Administrative Law Judge believes it inappropriate for individual operators or program participants to use the contested case process to argue, essentially, policy decisions made by the authorized OMC and the Department, with which they disagree without having some direct financial interest in the proceeding. In this case, Mr. Chamberlin apparently disagrees, philosophically, with the current position of the OMC and the Department on the need for continuing partnerships. The way to assert that philosophical belief is to convince the Operator Management Committee and the Department or to participate in a rulemaking proceeding on the subject. The legal process and its resulting cost to the programs for the blind should not be used to attempt to circumvent decisions made by persons

responsible for the operation of the programs, unless the complaining party has some direct financial interest and can establish some violation of law.

BDC